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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 801

AERO DESIGN & ENGINEERING CO., ET AL.,
Appellants,

VERSUS

OKLAHOMA EMPLOYMENT SECURITY COMMISSION, ET AL.,
Appellees.

MOTION TO DISMISS OF APPELLEE JACK D. ABRAHAM

C. W. SCHWOERKE,
Colcord Building,
Oklahoma City, Oklahoma;

HARRY C. CLARK,
Rialto Building,
Kansas City, Missouri,

JAMES E. GRIGSBY,
Colcord Building,
Oklahoma City, Oklahoma;

Attorneys for Appellee Jack D. Abraham.

March, 1957.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 8-8750

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MOTION TO DISMISS OF APPELLEE JACK D. ABRAHAM

Appellee Jack D. Abraham moves the Court to dismiss this appeal under Rule 16(1)(b) of the Rules of this Court, on the ground that the Supreme Court of Oklahoma in *Abraham* v. *Van Meter*, 303 P.2d 434, has decided, on an adequate non-federal basis, that appellants as employers and contributors to the unemployment insurance fund, under the Oklahoma Unemployment Compensation Act (40 O.S. 1951, 211, *et seq.*) cannot be deprived of any property because of payment of unemployment benefits under an erroneous administrative decision because the Act provides that "if such decision is finally reversed no employer's account shall be charged with benefits as paid pursuant to the erroneous determination." And the Supreme Court of Oklahoma also held (p. 439):

"Nor can it be said that, under the Oklahoma Act, the unemployment insurance fund itself will suffer any ultimate loss or depletion, indiscriminately, or in all cases, by reason of the payment herein complained of, for Section 216(f) provides for 'Recovery and Recoupment' within the 'discretion of the Commission' and upon certain considerations referred to therein."

Appellants have "not made the showing of substantial harm, actual or impending, to any legally protected interest which is necessary to call in question the statute's validity." *Gange Lumber Co.* v. *Rowley*, 326 U.S. 295.

C. W. SCHWOERKE,
Colcord Building,
Oklahoma City, Oklahoma;

HARRY C. CLARK,
Rialto Building,
Kansas City, Missouri,

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Colcord Building,
Oklahoma City, Oklahoma;

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JOHN T. FEY, C

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM OF APPELLEES OKLAHOMA EMPLOYMENT SECURITY COMMISSION AND DAVE VANDIVIER, HUGH L. HARRELL, T. C. "TED" KNOOP, E. R. BURNS AND TOM CHESHER, THE MEMBERS THEREOF; BRUTON WOOD, THE EXECUTIVE DIRECTOR THEREOF; AND MARK NEUMANN, THE CHIEF OF BENEFITS THEREOF

MILTON R. ELLIOTT,
c/o Oklahoma Employment Security Commission,
American National Building,
MAC Q. WILLIAMSON,
Attorney General of the State of Oklahoma,
JAMES C. HARKIN,
Assistant Attorney General of the State of Oklahoma,
Capitol Building,
Oklahoma City, Oklahoma;
Attorneys for Movant Appellees.

March, 1957.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 8-8780

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MOTION TO DISMISS OR AFFIRM

Appellees, Oklahoma Employment Security Commission, and Dave Vandivier, Hugh L. Harrell, T. C. "Ted" Knoop, E. R. Burns and Tom Chesher, the members thereof, Bruton Wood, the Executive Director thereof, and Mark Neumann, the Chief of Benefits thereof, move to dismiss

the appeal herein upon the ground that the appeal is not within the jurisdiction of this Court, or, in the alternative, to affirm the judgment of the trial court upon the ground that it is manifest that the questions on which a decision in this appeal depends are so unsubstantial as not to need further argument.

STATEMENT

As stated by the appellants in their Statement as to Jurisdiction herein (page 3), this appeal involves the validity of a portion of the Oklahoma Employment Security Act. The appellants' statement (on pages 3, 4, 5, and 6 of their Statement as to Jurisdiction) as to what that Act provides is correct, except for that portion thereof (at the bottom of page 6 of said Statement) that "funds once disbursed from the Fund are never recovered. Thus the Fund is permanently depleted if, because of the double affirmation clause, a claim is paid on an erroneous determination" (see pages 33 and 34 of the appellants' Statement as to Jurisdiction, where the opinion of the three-judge Federal District Court involved herein discusses a portion of an opinion of the Supreme Court of the State of Oklahoma concerning that matter).

The facts, as set forth in the appellants' "Statement of the Case," at pages 8 through 14 of their Statement as to Jurisdiction, are substantially correct.

A true and correct copy of the *Abraham* opinion of the Supreme Court of the State of Oklahoma in the related case, referred to in such "Statement of the Case," is appended to this alternative motion and made a part hereof.

ARGUMENT AS TO DISMISSAL

The basic allegation of the appellants' complaints in the Federal District Court is, that the payment of unemployment compensation benefits—as required by a portion of Section 216(e) of Title 40, Oklahoma Statutes 1951—to certain individuals pending an appeal by the plaintiff to the State District Court from an order of the Board of Review, referred to in said statute, affirming the allowance of such individuals' claims for such benefits, would deprive the plaintiff of its property without due process of law, in violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States; and the prayer of the complaints is that such statute (or the operation thereof in the circumstances involved in this case) be declared to be violative of that provision of the United States Constitution and the defendant State Commission, its members, and officials, be enjoined from complying with said provisions of said state statute.

Federal jurisdiction, in this case, depends upon 28 U.S.C., Sec. 1331. Although, under that section, the federal question involved COULD be separate and distinct from, and purely incidental to, the matter in controversy, the primary relief prayed for in the case at bar, if granted, would be a "declaratory judgment or decree" provided for in 28 U.S.C., Sec. 2201, and the injunctive relief prayed for, if granted, would be secondary and entirely dependent upon the granting of the declaratory judgment or decree prayed for by the plaintiffs.

Consequently, in this case, the "matter in controversy" is whether or not the Oklahoma Statute in question (Section 216[e] of Title 40, Oklahoma Statutes 1951) or the

operation thereof, deprives, or would deprive, any plaintiff (appellant) of ITS property without due process of law, in violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States; and, unless a plaintiff is, or would be, deprived of some of ITS property by the operation of the Oklahoma statute under attack herein, neither the Federal District Court, nor this Court on appeal, has any jurisdiction.

The general rule in such cases is that unless the sum or value of the property of which the plaintiff itself is, or would be, deprived exceeds $3,000.00, exclusive of interest and costs, the Federal District Court does not have jurisdiction.

In their complaints, each plaintiff alleged that "the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000)," but the only allegation which would tend to support that conclusion of the plaintiff is to the effect that payment of the unemployment compensation benefits as provided for in Section 216(e) of Title 40, Oklahoma Statutes 1951 prior to the conclusion of the plaintiff's appeal to the State Court from the decision of the Board of Review, would increase the "state experience factor" and, therefore, would increase the plaintiff's rate of contribution, and contributions, in the future.

However, on the trial of the action, the plaintiffs made no attempt whatsoever to prove that such payments would, necessarily or even probably, result in an increase in their rate of contribution, and contributions, to the unemployment compensation fund in the future. Indeed, plaintiffs abandoned this theory, and relied, and now rely (according

to their Statement as to Jurisdiction) upon the statement in the answer of the Commission that, in the situation involved in this case, unemployment compensation benefits in excess of $24,000.00 would have been paid under the statute in question, to otherwise qualified individuals, between the filing of the plaintiff's appeal in the State District Court and the trial of this action in the Federal District Court, if the plaintiff had not obtained a restraining order from the State District Court (at the time of filing its appeal therein from the decision of the Board of Review), and had not obtained a temporary restraining order from the Federal District Court (at the time of filing this action therein), on the date that the Supreme Court of Oklahoma had ordered the State Court's restraining order dissolved and vacated.

In an attempt to get around the general rule as to jurisdictional amount, the plaintiffs relied, in the trial court, upon Federal Court decisions in "true class suits," such as, actions by stockholders of a corporation to enforce a corporate right which the officers of the corporation refused to enforce, thus protecting the common interest of all of the stockholders of the corporation in the corporate assets or funds involved, and actions by beneficiaries of trusts to compel restoration of trust funds unlawfully expended, thus protecting the common interest of all of the beneficiaries of the trust in the trust assets or funds involved. In the trial court, as in the Statement as to Jurisdiction (page 17), the plaintiffs also cited the Oklahoma case of *State* v. *Tulsa Flower Exchange*, 192 Okla. 293, 135 P.2d 46, for the proposition that the Oklahoma Employment Security Act is a taxing statute, and the Oklahoma case of *Vette* v. *Childers*, 102 Okla. 140, 228 Pac. 145, for the proposition that, in Ok-

lahoma, a taxpayer has an "equitable ownership" in public funds raised by taxation and can maintain an action to restrain their unlawful expenditure.

Apparently, the three-judge Federal District Court, in this case, adopted that view as to the jurisdictional amount (Memorandum appended to appellants' Statement as to Jurisdiction, pages 27 and 28).

However, although the Supreme Court of the State of Oklahoma, in the *Abraham* case (opinion appended hereto), did not expressly overrule the *Vette* case, it did hold, in effect, that, under the Oklahoma Employment Security Act, an employer who pays contributions into the unemployment compensation fund does not have such an interest in the unemployment compensation fund as to entitle it to an order restraining payments therefrom in compliance with Section 216(e) of Title 40, Oklahoma Statutes 1951—the section directly involved in this appeal—thus, in effect, overruling the *Vette* case insofar as the unemployment compensation fund provided for in the Oklahoma Employment Security Act is concerned.

In answer to appellants' contention (Statement as to Jurisdiction, page 17) that, by deciding the due process question, the Supreme Court of Oklahoma, in the *Abraham* case, recognized Aero Design's right to raise that question, and, therefore, did not hold that an employer has no property right or interest in the unemployment compensation fund: It is to be noted that, as indicated by the Oklahoma State Court opinion, the employers involved contended therein that payments in compliance with the statute under attack would increase the state "experience factor," and

thus result in an increase in their rate of contributions, and contributions, in the future. Consequently, by deciding the due process question, in the way it did, the Oklahoma Supreme Court did not recognize that any employer had any property right or interest in the unemployment compensation fund, but, in effect, held that they had no property right or interest to be protected by the "due process" clauses of the State and Federal Constitutions. Further, as shown below, the Court did hold that the employers had no "interest" in said fund.

This is clear when it is noted that the Oklahoma Court said, in connection with the question of property right in the fund:

> "*The only issues presented herein* have been settled to our satisfaction by *Abelleira* v. *District Court of Appeals, Third District* (Cal.), 109 P.2d 942, 132 A.L.R. 715" (Emphasis supplied).

and, on that point, and on the same "due process" clause attack, the California Court, in the *Abelleira* case, said:

> "*The employers seek to avoid the operation of the rule, however, by the contention that they would suffer irreparable injury if the administrative hearing were permitted to proceed and its orders made effective without judicial interference at this time.* The cases they cite are those dealing with rate orders of regulatory commissions, where the administrative body imposes a confiscatory rate on a public utility. Continued operation of the business at the rate imposed pending the appeal may in some instances be so unprofitable as to amount to a destruction of the business, and therefore a taking of property *without due process of law.* The courts in these cases issue injunctions to stay the enforcement of the new rate until a final determination of its validity, in order to protect the constitutional

rights of the petitioning utilities. *In brief, these decisions establish the right to equitable relief to protect the property rights of a petitioner from irreparable injury* immediately threatened by a void administrative act. The soundness of this proposition cannot be questioned, *but it has no relevancy here.*

"*What injury do the employers show?* They say that they will suffer in the event unauthorized payments are made to unemployed workers, because their accounts will be charged with such payments, and their reserve under Section 39 of the act will be thereby decreased, with *the ultimate result that they may in 1941 pay contributions at an increased rate. In examining this contention, we must remember just what the employers are trying to do. They are attempting to prevent payment of public funds in which they have no direct interest,* by a body specially charged with the duty of making such payment. We held in the *Bodinson Mfg. Co.* case, *supra,* that they are aggrieved parties entitled to demand judicial review. But the question here is not whether they are aggrieved to the extent necessary to gain standing on appeal or review. The question is whether the payment of benefits at this time constitutes such an immediate and irreparable injury as to warrant the drastic step of interfering with an uncompleted administrative proceeding, in defiance of an established rule of jurisdiction. To this question there are several decisive answers.

"In the first place, *their whole contention is purely speculative.* The maximum contribution which they can be required to pay under the statute is 2.07 per cent. This cannot be increased, and the extent of their possible injury would therefore be the loss of a hoped for lower rate under the co-called merit rating provision of the statute. This provision enables employers with a favorable employment experience to obtain a slightly lower rate of contribution, when their account

on the commission books shows an excess of contributions over benefits paid. See secs. 39, 40, 41, St. 1935, p. 1233, St. 1939, p. 2147. But the narrow range in which the contribution rate fluctuates can be affected by a variety of circumstances and by numerous instances of unemployment. It cannot be determined at the present time whether this particular order of payment would in the light of all the occurrences of the past year and any other period involved, actually result in a changed rate. See 88 Univ. Pa. L. Rev. 137, 142.

"Second, it is provided in section 67 of the act that in the event that any payments of benefits are found to be erroneous the particular employer's account shall not be charged with them. *This being so, it is not clear how his contributions can be increased by the payments,* since the factor determining the rate is made *inapplicable in such event*" (109 P.2d 942 at 951 and 952; Emphasis supplied).

As above emphasized, the California Court declared unequivocally that "They are attempting to prevent payment of public funds in which they have no direct interest," and the Oklahoma Court, having fully adopted the reasoning of the California Court, conclusively made the same declaration as if set out verbatim in its decision. Thus, the Oklahoma Supreme Court, regardless of prior expressions as to "rights" of taxpayers in public funds raised by taxation, did expressly declare that the employers under the Oklahoma Act have no "direct interest" in the "public funds," constituting the Oklahoma unemployment compensation funds. The Federal Court's decision, on appeal herein, also concludes that the Oklahoma Supreme Court held that Oklahoma employers had no "property or litigable interest" in such "funds."

The appellants, in the trial court, as in their Statement as to Jurisdiction (pages 15 and 19), cited decisions from other states holding that the employer has a property right in such funds, but it must be noted that, in each case, the court was construing the provisions of its own Employment Security Act, and the Supreme Court of Oklahoma, in the *Abraham* case, construed the Oklahoma Act. Consequently, none of those cases from other states—other than the *Abelleira* case from California, which the Supreme Court of Oklahoma followed—is in point in this case.

In view of the construction of the Oklahoma Act by the Supreme Court of Oklahoma, in the *Abraham* case, the Federal District Court, and this Court on appeal, is without jurisdiction in this case.

ARGUMENT AS TO AFFIRMANCE

Assuming, for the purposes of this motion to affirm only, that the trial court was correct in finding that it had jurisdiction, then, from a consideration of the opinion of the Supreme Court of Oklahoma in the *Abraham* case, and the adopted reasoning of the Supreme Court of California in the *Abelleira* case on the question of the employer's property right in the Unemployment Compensation Fund or injury by payments from such fund, it is manifest (especially in view of the case of *Gange Lumber Co.* v. *Rowley*, 326 U.S. 295, 90 L. Ed. 85, cited by the trial court) that the trial court was correct in holding that the appellants would not be deprived of any property without due process of law in violation of the Federal Constitution, by payments in accordance with the statute under attack herein.

CONCLUSION

We, therefore, respectfully submit that this appeal should be dismissed, or, in the alternative, that the decision and judgment of the trial court dismissing appellants' compaints should be affirmed, without further argument.

MILTON R. ELLIOTT,
c/o Oklahoma Employment Security Commission,
American National Building,
Oklahoma City, Oklahoma;

MAC Q. WILLIAMSON,
Attorney General of the State of Oklahoma,
Capitol Building,
Oklahoma City, Oklahoma;

JAMES C. HARKIN,
Assistant Attorney General of the State of Oklahoma,
Capitol Building,
Oklahoma City, Oklahoma;

Attorneys for Movant Appellees.

Of Counsel:

BURTON DUNCAN,
c/o Oklahoma Employment Security Commission,
American National Building,
Oklahoma City, Oklahoma.

March, 1957.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JACK D. ABRAHAM, ET AL., Plaintiffs,	)	
v.	)	No. 37396
HONORABLE A. P. VAN METER, DISTRICT JUDGE, OKLAHOMA COUNTY, OKLAHOMA EMPLOYMENT SECURITY COMMISSION, BRUTON WOOD, DAVE VANDIVIER, HUGH HARRELL, T. C. "TED" KNOOP, E. R. BURNS, TOM CHESHER and MARK NEUMANN, Defendants,	)	

SYLLABUS

The provision of the Oklahoma Employment Security Act [Tit. 40, O.S., 1951, Sec. 216(e)] for payment of unemployment insurance benefits where the decision for such payment by an appeal tribunal of the Oklahoma Employment Security Commission is "affirmed in any amount" by said Commission's Board of Review is not unconstitutional as in violation of Art. VII, Sec. 10, of the Oklahoma Constitution, or as denying "due process" to the last employer of the claimants of such benefits, and other employer-contributors to the unemployment compensation fund, in violation of Art. II, Sec. 7 of said Constitution and the 14th Amendment of the U. S. Constitution.

Original action by claimants of unemployment insurance benefits allowed them by the Oklahoma Employment Security Commission, against the Honorable A. P. Van Meter, Judge of the District Court within and for Oklahoma County, State of Oklahoma, for a writ to compel said Judge and Court to vacate an order entered in Cause No.

138693 of said Court restraining payment of said benefits during the pendency of said cause.

WRIT GRANTED

C. W. Schwoerke, and
W. A. McWilliams, Oklahoma City, and
Harry Clark, Kansas City, Missouri,
For Plaintiffs,

Lytle, Johnston & Soule, Oklahoma City,
For Defendant, A. P. Van Meter,

Withington, Shirk, Nichols & Clifford, and
Tom Watts, Oklahoma City,
For Amicus Curiae,
Robberson Steel Company,
Capitol Steel & Iron Company,
Associated Industries of Oklahoma.

BLACKBIRD, J.:

The correct determination of whether or not this Court should assume jurisdiction and issue the writ herein sought, requires a determination of the constitutionality of a certain portion of the legislation originally enacted in 1936, and designated as the "Oklahoma Unemployment Compensation Law", and which, as later amended, has been given the official designation of "Oklahoma Employment Security Act" (Tit. 40, O.S. 1951, Secs. 211, *et seq.*).

One of the principal purposes of this body of legislation, which we will hereinafter refer to merely as the "Act", "Statute", or "law" is to obtain for the individuals, to which it applies, compensation, on a weekly basis, for periods of their unemployment. To effectuate this purpose, it contains comprehensive and detailed provisions governing the payment of such monetary benefits from a special fund called the "unemployment compensation fund", under the administration of a body, appointed by the Governor, and known as the "Oklahoma Employment Security

Commission", hereinafter referred to merely as the "Commission" (Secs. 219, 220, *Ibid.*).

Besides providing for the filing of claims for such benefits by individuals, the Act prescribes certain requirements for their eligibility, and a system, within the framework of the Act itself, by which eligibility shall be determined. Thus, Sec. 214 of said Act prescribes certain findings that the Commission must make before an unemployed person will be eligible for such benefits in respect to any week. One of these findings is that said person is not only able to work, but that he is "available for work" [Subsec. (c), *Ibid.*]. Sec. 214, subsection (d) (1) provides that "No week shall be counted as a week of unemployment * * * (for the purpose of said subsection); * * * (3) Unless the individual was eligible for benefits with respect thereto as provided in Sections 5 and 6" of the Act. The Section 6, referred to, now appears as Section 215 of Title 40, *supra*. Said section prescribes certain circumstances under which an individual shall be disqualified for benefits. One of them, set forth in subsection (c) of said section, is the claimant's having "failed, without good cause, either to apply for or accept if offered, available, *suitable* work * * *" (Emphasis ours). Paragraph (2) of said subsection (c) provides, among other things, that no work shall be deemed "suitable", nor benefits be denied any otherwise eligible person for refusing to accept new work:

> "(A) If the position offered is vacant due directly to a strike, lockout or other labor dispute; * * *."

According to said section, an individual may also be disqualified for benefits:

> "(d) For any week with respect to which the Commission finds that his unemployment is due to a stoppage of work which exists at the factory, establishment or other premises at which he is or was last employed, because of a labor dispute; * * *."

[APPENDIX]

The present controversy arises out of claims for unemployment benefits filed under the above-described Act by one Jack D. Abraham and 256 other former employees of the Aero Design & Engineering Company of Bethany, Oklahoma. Said claimants were members of the United Auto Workers Union and became unemployed as a result of a labor dispute which was later determined to have existed on November 29th, 1955, and, as far as is revealed herein, still continues. As Section 216(c)(2) of the Act requires such procedure for determination of issues concerned in claims involving the application of the above-quoted provisions of Sec. 215(d), *supra* ["Section 6(d)"], when so directed by the Commission, the aforesaid claims were transmitted to an "Appeal Tribunal" for the purpose of determining whether claimants should be disqualified for benefits for the week beginning January 1, 1956, and the following weeks, because of the labor dispute. After investigations and hearings, as prescribed in the Act, the Appeal Tribunal found that a stoppage of work resulted from the dispute until December 28, 1955, and (apparently) held that claimants were not disqualified for unemployment benefits after that date. Subsequently, claimants filed a petition for an additional finding of fact as to the extent, if any, of the curtailment of operations at the employer's three plants and, pursuant thereto, Referee Dwight K. Starr, as Appeal Tribunal, made a written "determination" in February, 1956, in which he found that the labor dispute, which existed November 29, 1955, ceased to exist on January 1, 1956; and that therefore there "was no longer a sound basis" for claimants' disqualification for benefits by reason of a work stoppage. Thereafter, a "further appeal" [prescribed by subsection (d), paragraphs (3)-(6), incl., of Section 216, *supra*] was taken to the Board of Review, which, upon consideration of the Commission's records, a transcript of the testimony taken before the Appeal Tribunal, additional testimony offered before said Board and briefs and argument of counsel, pro-

mulgated its decision on May 22, 1956. In its written opinion then filed in said matter, the Board modified the Appeal Tribunal's aforesaid determination, by concluding that the work stoppage ceased to exist on February 12, 1956 (instead of January 1st, as found by the Appeal Tribunal), and allowed benefits to claimants for and after that date.

Thereafter, the employer, Aero Design & Engineering Company, in view of its right under subsection (d), paragraph (7) of Section 216, *supra*, to have the Board's decision judicially reviewed, instituted an action in the District Court of Oklahoma County. In said action, docketed as said Court's Cause No. 138693, said plaintiff named as defendants, not only the aforesaid claimants, but also the Board of Review, and its members, and the Oklahoma Employment Security Commission, and its members. The petition filed in said court action prayed the court, among other things, not only to reverse the Board of Review's aforedescribed decision on the ground that claimants were (1) ineligible for benefits as being "unavailable for work" within the meaning of Section 214, *supra*, and (2) disqualified from receiving such benefits by reason of a "stoppage of work" within the meaning Section 215(d), but it also prayed that the defendant, Oklahoma Employment Security Commission, its members, and its Executive Director and Chief of Benefits, be restrained and enjoined from disbursing any such benefits to the defendant claimants during the pendency of said action. Pursuant to said prayer, and before any hearing on the merits of said Cause No. 138693, one of the Judges of said district court entered an order in said cause, on May 23, 1956, temporarily restraining any and all disbursement of the aforedescribed monetary benefits. Thereafter, the claimant defendants filed a motion to dissolve said order and also a plea to said court's jurisdiction.

After the temporary order was supplanted by "RESTRAINING ORDER PENDENTE LITE" entered in said

cause on June 7, 1956, by the Honorable A. P. Van Meter, one of said district court's judges, said claimants, who appear herein as petitioners, filed this original action, alleging, among other things, that, in entering said order, Judge Van Meter and the court for which he was acting, assumed to exercise power not granted it by law and praying that we issue a writ commanding him to dissolve the aforesaid order in said Cause No. 138603, and that we also order the respondent, Oklahoma Employment Security Commission, to pay the unemployment benefits provided by "Oklahoma Statutes" and now being withheld from them under said District Court's aforementioned restraining order.

Petitioners' position that by issuing the restraining order the Respondent Judge has exceeded his legal authority is based upon subsec. (e) of Sec. 216, *supra*, which reads as follows:

> "PAYMENT OF BENEFITS. Benefits shall be promptly paid on any claim in accordance with a determination or redetermination, unless a party files an appeal with an appeal tribunal as provided in this Section. *If pursuant to a* determination or *redetermination benefits are payable in any amount* as to which there is no dispute, or *with respect to unemployment following the maximum disqualification period that may be imposed because of an alleged factor surrounding the separation from work, such amount of benefits shall be promptly paid regardless of any appeal. The commencement of a proceeding for judicial review pursuant to Subsection (d)(7) of this Section shall not operate as a supersedeas or stay unless the Board of Review shall so order and the filing of a petition for judicial review by the Commission from a decision of the Board of Review which allowed benefits shall not authorize the Board or any court to direct the denial of any benefits which would have been payable under the Board*

of Review's decision. If a determination allowing benefits is affirmed in any amount by an appeal tribunal, or is so affirmed by the Board of Review, or *if a decision of an appeal tribunal allowing benefits is affirmed in any amount by the Board of Review, such benefits shall be promptly paid regardless of any further appeal, and no injunction, supersedeas, stay, or other writ or process suspending the payment of such benefits shall be issued by* the Board or *any court* but if such decision is finally reversed no employer's account shall be charged with benefits as paid pursuant to the erroneous determination and benefits shall not be paid for any subsequent weeks of unemployment involved in such reversal" (Emphasis ours).

In his Response to the application herein, the respondent District Judge seeks to justify his issuance of the RESTRAINING ORDER PENDENTE LITE [in contravention of the above-quoted Section 216(e)] on the ground of the "apparent unconstitutionality" of its emphasized provisions (the latter portion of which is part of the so-called "double affirmation clause") in so far as they authorize "disbursement of unemployment benefits prior to a final determination that claimants are lawfully entitled" to receive them. He says said section is in contravention of the power granted district courts by Art. VII, Sec. 10, to grant restraining orders and injunctive relief, and that the disbursement thereby authorized "would deprive those contributing to, and having a property right in, the Unemployment Compensation Fund (,) of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and Article II, Section 7, of the Constitution of Oklahoma."

Robberson Steel Company, Capitol Steel & Iron Co., and Associated Industries of Oklahoma appear herein as *amicus curiae* with argument contemplated to support, and against disturbing, the respondent court's action, and, with

the claim, among others, that as employers and contributors to the Unemployment Compensation Fund, they have a property right in it, and an interest in seeing that it is used only for lawful purposes. In this connection they say the contribution rate of all employer-contributors to said Fund "is determined in a large measure by the State Experience Factor as set out in the Act, and in as much as this State Experience Factor is determined by the amount of benefit wages and benefit payments of all covered employees in the State, any increase in benefits paid to such employees will tend to increase the State Experience Factor and will therefore increase" their rate of contribution to the Unemployment Compensation Fund.

As we view the matter, it has not been demonstrated that the operation or enforcement of the Act in question will have the effect of taking any property, without due process of law, from Aero Design & Engineering Company, or any former employer situated similarly to it, or, to those on whose behalf *amicus curiae* briefs have been filed. The only issues presented herein have been settled to our satisfaction by *Albelleira* v. *District Court of Appeals*, THIRD District (Calif.) 109 P.2d 942, 132 A.L.R. 715. Despite the absence, pointed out in the response brief filed herein, of an expression regarding "due process" in Headnotes "13" and "14" of that opinion, it is said in Headnote "7" thereof, that the California "Unemployment Insurance Act", which corresponds to the Oklahoma Unemployment Security Act herein dealt with, "fulfills each requirement of 'due process of law'." That statement is repeated almost verbatim in the body of the opinion. While, as pointed out in the aforementioned respondent's brief, *employees* (as well as employers) do not contribute to the Oklahoma unemployment benefits fund, we perceive in this circumstance, no material distinction between this case and the cited one, or any valid reason why the logic and principles therein expressed and applied concerning

the only issues here presented, should not apply with equal force here. We do not think this difference renders the Oklahoma Unemployment Fund any less a "public" or "semipublic" fund than the California unemployment fund, was regarded in that case. There the court, among other things, said:

> "The foregoing cases demonstrate the weakness of the argument that because a commission may make an occasional error in ordering some payment out of a public or semipublic fund, the courts must have the power to stay any and all payments during the lengthy period of judicial review. The legislature has concluded that it is wiser to have a system of unemployment compensation operating with a possible small percentage of error, than to have a system not operating at all. The legislative power to make such provision is unquestioned; the statutory language cannot be misunderstood; and for the courts that is the end of the matter."

Another distinction that readily appears between the two cases is that in the California case there had been only one "affirmation" of the initial determination, instead of the "double affirmation" with an appeal before the Commission or Board of Review already concluded, as is the case here. There is some dispute in the briefs as to whether there has ever been a double administrative affirmation in the present case, and there are recitals in the Board of Review's opinion, *supra*, representing that the question of "eligibility" therein determined, (and sought by respondent to be distinguished from the question of "disqualification") had not previously been decided. However, as hereinbefore quoted, Section 216(e) provides in part:

> "* * * If pursuant to a determination *or* redetermination benefits are payable in any amount * * * with respect to unemployment following the maximum disqualification period that may be imposed be-

cause of an alleged factor surrounding the separation from work, such amount of benefits shall be promptly paid regardless of any appeal" (Emphasis ours).

We think that for the purpose of determining whether or not "last" employers, and/or employer-contributors generally, are deprived of due process of law by payment of initial benefits to claimants prior to the conclusion of a judicial review, the question of whether or not there has been a *double* administrative affirmation is unimportant. As we see it, the only significance that such a matter might have would be in determining the question of whether or not the administrative remedy has been exhausted—a question of fact which is not directly involved in the broader issues here presented.

Respondent has supplemented his brief with a recent opinion promulgated October 1st, 1956, (not yet officially reported) by the Supreme Court of Pennsylvnia (E. D.) in the case of *Pennsylvania State Chamber of Commerce et al.* v. *John R. Torquato et al.*, which adopts excerpts from, and affirms, an earlier opinion in the same case, promulgated by the Court of Common Pleas of that State's Dauphin County. In one of the portions of said lower court's opinion adopted and incorporated in the Supreme Court's opinion, the following appears:

> "The Westinghouse Electric Corporation is a proper party plaintiff, not only as a contributor to the Unemployment Compensation Fund, and therefore a taxpayer; * * * (citing cases); but also because *its own reserve account will be charged with the payment of any unemployment benefits that are made and its present contribution rate thereby jeopardized*" (Emphasis ours).

It is not demonstrated herein that the above-emphasized statement of the court concerning Westinghouse Electric Corporation, under the Pennsylvania unemployment bene-

fit law, is true of Aero Design & Engineering Company, and other contributors to our unemployment insurance fund, under the Oklahoma law. The Act here involved has substantially the same provision [Section 216(e)], referred to in the California law by the court in the *Abelleira* case, *supra,* when, in the course of its discussion of the question of whether or not an employer is deprived of any property by payment to claimants of initial benefits pending a judicial review, it said (p. 952):

> "* * * it is provided in Section 67 of the Act that in the event that any payments of benefits are found to be erroneous the particular employer's account shall not be charged with them. This being so, it is not clear, how a contribution can be increased by the payments, since *the factor determining the rate is made inapplicable in such event*" (Emphasis ours).

Nor can it be said that, under the Oklahoma Act, the unemployment insurance fund itself will suffer any *ultimate* loss or depletion, indiscriminately, or in *all* cases, by reason of the payments herein complained of, for Section 216(e) provides for "Recovery and Recoupment" within the "discretion of the Commission" and upon certain considerations referred to therein. This appears to be another distinction between the present case and the Pennsylvania case, for there the court said it was both "apparent" and "conceded" that if unemployment payments were made to the claimant they would *never* be recovered and the unemployment insurance fund would be depleted to the extent thereof. The court opined that, under the circumstances, the threatened payment was "likely to produce irreparable harm unless a supersedeas or injunction" was granted.

In *State* v. *Davis* (W. Va.), 45 S.E.2d 486, the court had before it the provision of the West Virginia law requiring payment of the benefits allowed by the decision of the Board of Review regardless of any further appeal. The

court there regarded the question of whether or not said provision was confiscatory, as having been fully answered in the *Abelleira* case, *supra*. There, however, the court said:

"That case has since been modified and it is not cited as authority save to the extent that we regard sound reasoning as controlling." We are aware of no modification in the *Abelleira* case which affects the questions presented in this case. It is true that after the decision of the California Supreme Court in that case, the District Court of Appeal of that State's First District in *American-Hawaiian S. S. Co.* v. *California E. Commission*, 128 P.2d 627, 632, issued a writ of "mandate" to require that State's Employment Commission not only to vacate its order for the payment of unemployment benefits, but to require it to refrain from charging the accounts of the involved employers with such payments. But in the latter case, it was alleged that all of such payments were in *violation of the plain terms of the California Unemployment Act*. Here, as in *State* v. *Davis, supra*, it has not yet been clearly shown that plaintiffs in Cause No. 138693 were attacking the Board of Review's previous decision as being "arbitrary, capricious or fraudulent * * *." In this connection, the petition filed in said cause merely alleges that there had been no "double affirmation", and prayed for a judicial review on the two grounds pertaining to eligibility and disqualification hereinbefore indicated, plus the additional ground that the board had erred in "refusing to permit plaintiff to present evidence on eligibility." Besides reversal on the first two grounds mentioned, the plaintiff prayed in the alternative that the Board's decision be vacated on said third ground, and that the cause be remanded to said Board for the taking of additional evidence "on the question of claimants' eligibility under (Tit.) 40, O.S., (1951) (Sec.) 214." The Board's opinion, which is the only record of its proceedings included in the documents filed herein, does not affirmatively show a refusal by it "to permit plaintiff to present evidence * * *." Further-

more, Sec. 216(d)(7), authorizes the court in the "Judicial Review", there prescribed, to order additional evidence taken before the Board, expressly contemplates that the Board's previous findings and conclusions may be modified upon hearing such evidence, and provides that the additional findings and conclusions, together with a transcript of the additional evidence, may then be filed in the court action. If Aero Design & Engineering Company's allegations, in its petition in Cause No. 138693, are of errors of the Board of such nature as could be cured by the taking of additional evidence, it is quite conceivable that same could be resolved to its satisfaction merely by the Court's granting of the alternative relief prayed for. The court action could then be dismissed upon its motion without any other order or judgment. Still, said company would have no right, under the Act, to prevent payment of initial benefits pending the court-directed rehearing before the Board of Review.

In view of the features of the Oklahoma Employment Security Act herein referred to, we do not agree with the views that the Michigan Supreme Court voiced regarding the allegedly unconstitutional aspects of that State's unemployment insurance law in *Chrysler Corp.* v. *Appeal Bd. of Mich. U. C. Com'n* (Mich.), 3 N.W.2d 302, and *Chrysler Corp.* v. *Smith*, 297 Mich. 438, 298 N.W. 87. Nor do we think that the provision herein questioned, when these features are considered in connection with it, necessarily operates to permit our State's unemployment insurance fund to be used for purposes never contemplated by said Act, as was said in *State* v. *State* (Ind.), 57 N.E.2d 433, of such a provision in the Indiana Act. At least it has not been shown to so operate in this case. On the basis of the pleadings, record and undisputed evidence, or facts, before us, we think it clear that the reasoning of the court in the *Abelleira* case, hereinbefore referred to, together with the other considerations herein noted, decisively show

that Aero Design & Engineering Company, the plaintiff in Cause No. 138693, failed in said cause to make a sufficient demonstration of its entitlement to the restraining order issued by the Respondent Judge therein, upon the ground that Section 216(e), *supra*, deprives said company of property without due process of law. We hold that, as the matter is presented herein, said section does not have that effect upon said company, or any of the other parties appearing herein. We further hold that said portion of the law is not an unconstitutional exercise of legislative power in limitation or curtailment of the power previously vested in our district courts by Art. VII, Sec. 10, Oklahoma Constitution, to issue restraining orders and grant other relief of an injunctive character prescribed therein.

Accordingly, petitioner's application to this Court to assume jurisdiction and issue a writ to the Respondent Judge is hereby granted to the extent of directing the District Court Within And For Oklahoma County, State of Oklahoma, and said Respondent as a judge thereof, to vacate the RESTRAINING ORDER PENDENTE LITE, and desist from any further effort to prevent payment by the Oklahoma Employment Security Commission of the initial benefits to which, under the decision of said Commission's Board of Review, Jack Abraham and the other 256 employees of Aero Design & Engineering Company, are entitled.

JOHNSON, C. J., WELCH, HALLEY, JACKSON and CARLILE, JJ., Concur.

WILLIAMS, V. C. J., and CORN, J., Dissent.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

JACK D. ABRAHAM, ET AL., Plaintiffs,	)	
v.	)	No. 37396
HONORABLE A. P. VAN METER, DISTRICT JUDGE, OKLAHOMA COUNTY, OKLAHOMA, ET AL., Defendants,	)	

ORDER

IT IS HEREBY ORDERED that the opinion heretofore promulgated in the above styled cause be and is hereby amended as follows:

(1) By deleting the "e" from the parenthesis immediately following "Section 216" on line 20, page 9 of said opinion, and inserting in lieu thereof the letter: "f";

(2) By deleting all of line 23 of page 8 of said opinion, except the words: "by the";

(3) By deleting from line 25 of said page, the words: "Forquato, et al.," and inserting in lieu thereof the following: "Torquato, et al., 125 A. 2d 755 * * *";

(4) By deleting all of the sentence appearing on lines 28, 29 and 30, of said page, except its first word: "In", ind inserting in lieu thereof, the following: "* * * the cited case, it was said: * * *."

DONE BY ORDER OF COURT this 19th day of November, 1956.

N. B. JOHNSON,
Chief Justice.

FILED
APR 13 1957
JOHN T. FEY, Clerk

In The
Supreme Court of the United States

No. 801

AERO DESIGN & ENGINEERING CO. ET AL.,
Appellants,

VERSUS

OKLAHOMA EMPLOYMENT SECURITY COMMISSION ET AL.,
Appellees.

APPELLANTS' BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

EDWARD E. SOULE,
ROBERT J. EMERY,
EVERETT E. COTTER,
CLARK NICHOLS,
EDWARD M. BOX,
BEN L. BURDICK,
Oklahoma City, Oklahoma,
Attorneys for Appellants.

APRIL, 1957.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY — PHONE FO 5-2969

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In The
Supreme Court of the United States

No. 801

AERO DESIGN & ENGINEERING CO., a Corporation; AMERICAN IRON & MACHINE WORKS COMPANY, a Corporation; ROBBERSON STEEL COMPANY, a Corporation; CAPITOL STEEL & IRON COMPANY, a Corporation; CAPITOL HILL TAXI OPERATING COMPANY, a Corporation; and ASSOCIATED INDUSTRIES OF OKLAHOXA, individually and on behalf of the class of persons similarly situated,

Appellants,

VERSUS

OKLAHOMA EMPLOYMENT SECURITY COMMISSION and DAVE VANDIVIER, HUGH L. HARRELL, T. C. "TED" KNOOP, E. R. BURNS and TOM CHESHER, the members thereof; BRUTON WOOD, the Executive Director thereof; MARK NEUMANN, the Chief of Benefits thereof; and JACK D. ABRAHAM and 256 others similarly situated,

Appellees.

APPELLANTS' BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

In compliance with Rule 16 the appellants submit herewith their brief in opposition to the Motion to Dismiss of the appellee, Jack D. Abraham, and in opposition to the Motion to Dismiss or Affirm of the appellees, Oklahoma Employment Security Commission, *et al.*

I. THE AMOUNT IN CONTROVERSY

Appellees argue that the jurisdictional amount is not present. This point was briefed extensively in the District Court, where it was held that Federal jurisdiction did exist. The court said:

> "The requisite amount in controversy is challenged, but the object of the suit is to restrain the commission from disbursing approximately $25,000 from the unemployment compensation fund. The disbursements are to be made to numerous persons for sums far less than the jurisdictional amount. But it is the value of the object of the suit which determines the amount in controversy, not the value to the individual beneficiaries. *Ronzio* v. *Denver & R. G. R. R.*, 116 F. 2d 604; *Boesenberg* v. *Chicago Title & Trust Co.*, 128 F. 2d 245; *Miller* v. *Nat'l City Bank of New York*, 147 F. 2d 798."

Three separate (but analogous) principles demonstrate that the jurisdictional amount is present in this case:

> A. Where a Fund is the "Mtater in Controversy" and it exceeds $3,000, federal jurisdiction exists.

By statutory definition the $25,000 in controversy is part of a "fund", specifically the Oklahoma Unemployment Compensation Fund.

40 Okl. Stat. § 219.

The Supreme Court of Oklahoma has characterized the Oklahoma Unemployment Compensation Fund as a "'public' or 'semi-public' fund", *Abraham* v. *Van Meter*, 303 P. 2d 434, 438. Authorities supporting Federal jurisdiction where the "fund" in controversy exceeds $3,000 include:

Boesenberg v. *Chicago Title & Trust Company*, (C. C. A. 7), 128 F. 2d 245;
Marion Mortgage Co. v. *Edmunds*, (C. C. A. 5), 64 F. 2d 248;
Eresch v. *Braecklein*, (C. C. A. 10), 133 F. 2d 12;
Miller v. *National City Bank of New York*, (C. C. A. 2), 145 F. 2d 798.

B. This is a "Class Action"; therefore, the $25,000 in dispute is the "Matter in Controversy".

A suit to preserve, protect or restore a fund is a "true class suit".

Boesenberg v. *Chicago Title & Trust Company*, *supra*.

The rule applicable to class actions is stated at 6 Cyclopedia of Federal Procedure 682:

> "In class actions the jurisdictional amount is measured, not by the amount due to any one member of the class, or due from any one defendant, but by the amount or fund to be recovered in the action, or the value of the object sought to be gained by the action."

C. In a "Taxpayers' Action" where the "Matter in Controversy" exceeds $3,000 federal jurisdiction exists.

The fund in question is a " 'public' or 'semi-public' fund".

Abraham v. *Van Meter*, 303 P. 2d 434.

In Oklahoma a contributor to the Oklahoma Unemployment Compensation Fund is a "taxpayer".

State v. *Tulsa Flower Exchange*, 192 Okl. 293, 135 P. 2d 46.

And in Oklahoma a taxpayer can sue to enjoin the unlawful expenditure of public funds.

Vette v. *Childers*, 102 Okl. 140, 228 P. 145.

The jurisdictional rule for citizens' and taxpayers' suits is stated in 1 Cyclopedia of Federal Procedure 365:

> "In order to confer jurisdiction on the district court, the requisite amount must be involved in citizens' and taxpayers' suits. Since such suits are in the right of the public, or all taxpayers, and not merely that of the individual plaintiff, a so-called taxpayer's suit to restrain officials or a public corporation from illegal action places in controversy the value or sum involved in the proposed action rather than the portion of the tax which in consequence will fall on the plaintiff."

This rule was applied:

City of Ottumwa v. *City Water Supply Co.*, (C. C. 8), 119 F. 315;

Johnston v. *City of Pittsburgh*, (Pa.), 106 F. 753;

Oklahoma Utilities Co. v. *City of Hominy*, (N. D. Okl.), 2 F. Supp. 849;

Armstrong v. *Townsend*, (Ind.), 8 F. Supp. 953.

In view of this clear and pertinent authority on jurisdiction, appellants submit that no real question exists as to Federal jurisdiction and that appellees' motions in this respect are without foundation.

II. FUNDS ONCE DISBURSED FROM THE FUND ARE NEVER RECOVERED, EVEN THOUGH THE DETERMINATION IS ERRONEOUS.

At page 2 of the motion filed by the Commission *et al.* said appellees take issue with appellants' statement that funds once disbursed from the Fund are never recovered and that the Fund is permanently depleted if because of the double affirmation clause a claim is paid on an erroneous determination.

The only statutory provision which pertains to the recovery of funds once disbursed is 40 Okl. Stat. § 216 (f), which provides:

> "Any individual who, by reason of a false statement or representation or failure to disclose a material fact in violation of Section 226 (a) of this Title, has received any sum as benefits under this Act to which he was not entitled shall be liable to repay such sum to the Commission for the Fund, or to have such sum deducted from any future benefits payable to him under this Act. If any individual, other than by reason of violation of Section 226 (a) of this Title, has received any sum as benefits under this Act to which under a redetermination or decision pursuant to this Section, he has been found not entitled, he shall not be liable to repay such sum but shall, in the discretion of the Commission, be liable to have such sum deducted from any future benefits payable

> to him with respect to the benefit year current at the time of such receipt; provided, however, that no such recoupment from future benefits shall be had if such sum was received by such individual without fault on his part and such recoupment would defeat the purpose of this Act or would be against equity and good conscience."

Under this section funds paid on a fraudulent claim are subject to recovery, although this is not made mandatory on the Commission. But as to other (*i.e.* non-fraudulent) claims, only *"in the discretion of the Commission"* is the claimant liable, and then only *"to have such sum deducted from any future benefits payable to him with respect to the benefit year current at the time of such receipt"*. Thus, not even a recovery provision is present here for money wrongfully paid but only the right to recoup by deductions *from future benefits payable within the same year.* Furthermore, it is provided that *"no such recoupment from future benefits shall be had if such sum was received by such individual without fault on his part and such recoupment would defeat the purpose of this Act or would be against equity and good conscience"*. From this we submit that it is fair to say that the so-called "recovery and recoupment" provision of the law is completely ineffective and virtually meaningless, and that the statement contained in appellants' statement as to jurisdiction is accurate. Furthermore, we have been unable to learn of any situations where Section 216 (f) has been actually employed by the Commission. Certainly it would

not be employed to recover the $25,000 in controversy in the present case if such sum were once disbursed and later adjudged to have been unlawfully disbursed.

III. THE FEDERAL COURT IS NOT BOUND BY THE OKLAHOMA DECISION OF ABRAHAM v. VAN METER.

The Supreme Court of Oklahoma by its decision in *Abraham* v. *Van Meter*, 303 P. 2d 434, effectively precluded appellants from obtaining in state court the relief sought by appellants in the present case in Federal court. Appellees seem to contend that this denial of relief in state court should operate to preclude relief in Federal court. Appellees argue that the Supreme Court of Oklahoma has interpreted the Oklahoma Employment Security Act in such manner as to preclude appellants from raising the Federal constitutional question urged by appellants.

Appellees' contentions are based upon the assumption that the Supreme Court of Oklahoma held in its decision in *Abraham* v. *Van Meter*, *supra*, that an employer-contributor to the Oklahoma Unemployment Compensation Fund has no property or litigable interest therein. The District Court so held, and thereby erred in interpreting the impact of the Oklahoma Supreme Court decision.

In determining just what the Oklahoma Supreme Court undertook to decide in the *Abraham case*, reference

must be made to the syllabus by the court, for in Oklahoma it is the syllabus by the court which states the law of the case. This is demonstrated by the holding of *Corbin* v. *Wilkinson*, 175 Okl. 247, 52 P. 2d 45, that:

> "The law adopted by the court is declared in the syllabus prepared by the court. 1921 O. S. § 551. The reasoning of the court *in the body of the decision* is an aid to the correct interpretation of the law as announced in the syllabus."

Appellees have quoted at length from a California decision cited by the Oklahoma court. However the portion of the California opinion quoted by appellees is not contained *in the body* of the Oklahoma decision, and hence cannot be employed to interpret the syllabus. Actually, the syllabus is perfectly clear in meaning and does not need interpretation.

The dignity of a syllabus by the Supreme Court of Oklahoma was described by that court in *City of Altus* v. *Martin*, 268 P. 2d 228, 234, wherein the court said:

> "Defendant says that the above syllabus was not necessary to the decision of the court in that case and that it was mere dictum. Be that as it may, it was adopted by this court, has not been overruled, and is a part of the law of this state."

Having noted the significance in Oklahoma of the syllabus by the court, it is pertinent to refer to the syllabus by the court in the *Abraham case* to learn just what the court did decide. The syllabus reads:

"The provision of the Oklahoma Employment Security Act [Tit. 40 O. S. 1951 § 216(e)] for payment of unemployment insurance benefits where the decision for such payment by an appeal tribunal of the Oklahoma Employment Security Commission is 'affirmed in any amount' by said Commission's Board of Review is not unconstitutional as in violation of Art. VII, Sec. 10, of the Oklahoma Constitution, or as denying 'due process' to the last employer of the claimants of such benefits, and other employer-contributors to the unemployment compensation fund, in violation of Art. II, Sec. 7 of said Constitution and the 14th Amendment of the U. S. Constitution."

In the foregoing syllabus the court dealt with nothing except the fundamental constitutional question of whether or not the double affirmation clause in the Oklahoma Employment Security Act contravenes due process of law. *The court did not hold (as appellees urge and as the District Court held) that employer-contributors to the Oklahoma Unemployment Compensation Fund are without right to sue to protect that fund or that they have no interest therein.* Thus this case is distinguishable from *Gange Lumber Co.* v. *Rowley*, 326 U. S. 295, 90 L. Ed. 85, wherein the state court had specifically held that the litigants had no interest in the fund in question.

The very fact that the Oklahoma court decided the constitutional question is in itself an admission of appellants' right to raise the question, for in *Bennett* v. *State*, 147 Okl. 14, 294 P. 249, the court held in the syllabus:

> "This court will not pass upon the constitutionality of an act of the Legislature until there is presented a proper case in which it is made to appear that the person complaining by reason thereof has been, or is about to be, deprived of some right or privilege to which he was lawfully entitled, or has been, or is about to be, subjected to some of its burdens and penalties."

If employers in Oklahoma were without right to sue to protect the Oklahoma Unemployment Compensation Fund from unlawful violation, then it would have been appropriate in the *Abraham case* for the Supreme Court of Oklahoma to have disposed of the case upon that basis. However in its opinion it did not even hint that such rule pertains in Oklahoma. The court considered and decided the constitutional question presented by the litigants, thereby recognizing the litigants' standing to raise the constitutional question.

Thus, both the District Court and the appellees have read into the Oklahoma decision in the *Abraham* case more than it contains. That decision is limited to the narrow determination of whether or not the double affirmation clause deprives appellants of due process of law. Admittedly the Supreme Court of Oklahoma is not the final authority on the Federal constitution. Therefore, its decision in the *Abraham case*, on purely constitutional grounds, does not preclude a Federal court from holding that the double affirmation clause violates the due process of law clause of the 14th Amendment.

At page 17 of their Statement as to Jurisdiction appellants have pointed to the decisions in *Vette* v. *Childers*, 102 Okl. 140, 228 P. 145, and *State* v. *Tulsa Flower Exchange*, 192 Okl. 293, 135 P. 2d 46, as sustaining appellants' right to maintain this action. In *Vette* v. *Childers*, the court held in the syllabus:

> "A resident taxpayer has an equitable ownership in funds in the state treasury and, although no private interest, he may invoke the interposition of a court of equity to restrain the payment of money appropriated by the Legislature in violation of the Constitution."

In *State* v. *Tulsa Flower Exchange*, *supra*, the court clearly denominated the Oklahoma Employment Security Act as a taxing statute when it said:

> "The statute here under consideration authorizes the collection of a tax from employers of a certain class. Since it is a tax statute it should be construed with the taxpayers' interest uppermost in mind, and the courts will not enlarge upon its provisions to make them applicable in any case not clearly within the contemplation of the Legislature."

The above quotations were not in any manner overruled by the Oklahoma court in the *Abraham case*. Therefore, under the rule of *City of Altus* v. *Martin*, *supra*, they still constitute "a part of the law of this state". It cannot be said that in the *Abraham case* the Supreme Court of Oklahoma did anything more than to reject the argument as to the unconstitutionality of the double

affirmation clause. The Supreme Court did not, either directly or by implication, reject the premise that a contributor to the Oklahoma Unemployment Compensation Fund has a property right therein and a right to maintain an action to protect the Fund.

We submit that the foregoing analysis of Oklahoma decisions demonstrates conclusively that the rule still pertains in Oklahoma that a taxpayer can sue to enjoin the improper use of public funds (such as the Oklahoma Unemployment Compensation Fund) and that the District Court erred in dismissing this case upon the premise that appellants had no property or litigable interest in the Fund. With this single objection removed, there remains before the court the purely Federal constitutional question of due process of law: whether or not the double affirmation clause of the Oklahoma Employment Security Act violates the 14th Amendment.

It is particularly noteworthy that appellees do not in their motions defend the double affirmation clause on constitutional grounds. They simply deny that appellants are entitled to litigate the question.

Respectfully submitted.

EDWARD E. SOULE,
Commerce Exchange Building,
Oklahoma City, Oklahoma;

ROBERT J. EMERY,
Commerce Exchange Building,
Oklahoma City, Oklahoma;

EVERETT E. COTTER,
First National Building,
Oklahoma City, Oklahoma;

CLARK NICHOLS,
Colcord Building,
Oklahoma City, Oklahoma;

EDWARD M. BOX,
Leonhardt Building,
Oklahoma City, Oklahoma;

BEN L. BURDICK,
First National Building,
Oklahoma City, Oklahoma,
Attorneys for Appellants.

APRIL, 1957.